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**NIKAH IS NOT A SACRAMENT BUT PURELY A CIVIL CONTRACT?**- Aman Gupta<sup>1</sup>**Abstract**

In India marriage has a sacrament value in the eyes of people and people is not considered marriage as a contract but under muslim law there are some essential things which are required at the time of marriage (nikah) which are similar to a civil contract. this manuscript all about describing the muslim marriage and essential practices which are required at the time of nikah and trying to find the similarities between the nikah and a civil contract. In nikah there are some essential like parties consent and competency of the party, consideration which are also essential at the time of forming a contract. With the help of different ruling of supreme court and high court and also observing the core essential of muslim law this manuscript concluded that muslim marriage is not a sacrament but a civil contract.

Nikah is an arabic word which means union of sexes and in law, this term is known as marriage. Different jurists have different opinion on nikah. Prophet of the Islam said that the marriage is my sunna and those who do not follow are not my followers. In Hedaya, nikah is a carnal conjunction. In legal language, it implies a particular contract used for the purpose of legalizing generation. Ashabah said marriage is a contract underlying a permanent relationship based on mutual consent of man and women. According to Justice Mahmood, marriage in mohammedan is not a sacrament but purely a contract and this was observed in the case of Abdul Kadir vs Salima.

Justice Mahmood observed that in Muslims, marriage is purely a contract and it is solemnized generally with the recitation of certain verse from the Quran. Mohammedan law does not prescribe any service for this occasion. It is a civil contract which is manifested from the various ways and circumstances under which the marriage is contracted or presumed to be contracted. Though it is a civil contract, it does not prescribe to reduce the writing but the validity and operation of the whole depends upon the proposal

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and acceptance of the contracting parties or their natural and legal guardian before competent and sufficient witnesses. From all these observations, Justice Mahmood took a view that it is nothing but a civil contract.



As Muslim communities follow certain social function and ceremonial rites at the time of marriage but such rites are not necessary legally because it is considered as a civil contract. In Muslims, for solemnization of marriage there are require certain from and formulas and these are known as essentials of valid marriage. If any of these requirements are not fulfilled at the time of marriage, marriage becomes void or irregular based on case. These essentials are that there should be a proposal by one of the parties to the marriage and acceptance by another party, in the presence of two males or one male and two female witnesses, who must be sane and adult muslims.

The proposal must be expressed at one and same meeting and if the proposal and acceptance is not in one meeting then the marriage does not constitute. Neither writing nor any religious ceremony is essential in the muslim marriage and it was held in the case of Jagu Bibi vs Mesal Shaikh. Even a muslim marriage is solemnized in the absence of priest. There are some important essentials which must be followed at the solemnization of marriage and they are proposal and acceptance, competent parties and no legal disability.

**Proposal and acceptance:** Marriage in Muslim law is constituted by ijab-a-qubool that is declaration and acceptance by the contracting parties. One party makes an offer known as ijab to the other party and marriage becomes complete when the other party has accepted the offer. According to the Muslim law, it is very necessary that the man or someone on behalf of him and woman or someone on behalf of her agree to marriage at one meeting and these marriage agreements are witnessed by two adult Muslims. It is a customary to send a relation of woman inside her house with two witnesses. The relation ask the girl within the hearing of witness, whether she agree to marriage on behalf of dower money offered by the husband and if the girl say yes then three person come out. The future husband and those three persons now placed before the Qazi.

Qazi asked the boy and if the boy says yes then the relation, who had gone inside, tells the Qazi he is agent of the girl, Qazi asks him whether he agrees to marriage on specified dower and if the relation say yes. The witness is also present there and if Qazi has any doubt, he should ask the same and when both parties give their consent, Qazi read the same portion of Quran and the marriage is complete and these all things should happen in one meeting.

In the case of Rashida khatoon vs S.K. Islam, a man assured a lady to marry and started cohabiting with her and after sometime a child was born to the couple and later she claimed the status of wife. Here the question before the court was whether the marriage is valid under muslim law. In this case Orissa High court cited with approval, a paragraph of the Mulla's book, for a valid marriage it is very essential that the proposal and acceptance by or on behalf of other, in the presence and hearing of two male witnesses who are sane and adult Muslim and this must be made at one meeting. A proposal and acceptance made at another meeting does not constitute a valid marriage. Neither writing nor any religious ceremony is essential. The court held in this case that there was no acceptance of offer to marry, there are only assurances of marriage therefore there is no valid marriage at all. Also in case of Mst. Zainaba vs Abdul Rahman, it was held by the court that there is no particular form in which the proposal and acceptance should be made. The acceptance of Ijab and Qabool may either be oral or writing and where the offer and acceptance are laid down in written document, such document is called Kabin-nama which is very important evidence of marriage.

The proposal and acceptance must be conveyed in the presence of each other or in the presence of their agent. The significance of this requirement lies in the fact that contract should be understood by both the parties. In Khazi Mohammad Abbas Ali vs Andhra Pradesh wakf board, the high court held that marriage under muslim law is a contract where the requirement is that person entering into the marriage should consent to such marriage in the presence of witness and Qazi presence is must at marriage and other religious ceremony but in the case of Quazi Mohammad Najmuddin Hussian vs State of Andhra Pradesh the court held that the Kazi's act 1880 does not give any power to any kazi under it and does not grant any privilege to the kazis under the act.

The other requirement for a valid marriage is that the transaction must be completed at one meeting. A proposal and acceptance in different meeting does not constitute a valid marriage. There must be reciprocity between the offer and acceptance and the acceptance must not be conditional.

Witnesses are required under Sunni law, the proposal and acceptance should be in the presence of two male or one male and two female witnesses who are sane and adult

muslims. Absence of the witness does not render the marriage void but irregular, but under Shia law witness are not required at the time of marriage. They are required at the time of dissolution of marriage.

There must be free consent of the contracting parties of marriage. The consent should without any fear or undue influence or fraud. In case of a boy or girl if he does not attain his puberty the marriage is invalid until the legal guardian gives consent to it. Free consent of an adult person is essential in a marriage and the father's consent is not the substitute for the girl's consent. In case of Sayad Mohiuddin vs khatijabai, the court held the marriage is void where marriage of a shafei girl who attained the puberty was performed by her father against her consent.

In the case of Sheikh Abdullah vs Dr. Husnaara Parveen, the Nagpur bench of Bombay high court said that muslims in india are governed by their personal law under which nikah is a civil contract and it may be permanent or temporary. For a valid marriage, all the ingredients of marriage must be satisfied. A woman who attains puberty is competent to enter into a contract of marriage. A validity of the contract also depends upon the free consent of the parties. But Hanafi school has this tradition where contract of marriage is valid even under compulsion or the offer and acceptance pronounced without any intention. The other three school of Sunnis and the Shia school do not follow this tradition. Under their school, marriage under compulsion is not valid.

**Competence of parties:** Under this act, the parties who are going to marry must have capacity of entering into the contract. They need to be competent. The parties should understand the nature of their act and if marriage is contracted by a lunatic person it becomes void except contracted by their respective guardians.

In the muslim law, majority and puberty are considered as same. As per the hedaya, the earliest period for boy is 12 years and for girl 9 years. Majority presumed in Hanafi law is on completion of fifteen year in case of both male and female unless any evidence to show the puberty was attained earlier and in case of shia law, the age of majority is considered with the beginning of menstruation. The muslim law is entirely untouched by the provisions of Indian majority act, 1875.

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In muslim law, the marriage of a minor become invalid if it is done without the consent of their guardian until it is ratified after the attainment of majority of the minor and this was held in case of Abdul kasem vs Mst. Jamila Khanum. Under muslim law a boy or girl can marry to anyone to whom they like after attaining the puberty and for this, the guardians have no right to interfere if the match be equal.

Under Sunnis law, the right of contracting a minor marriage is given to the father, parental grandfather, brother and other male relation on the father's side in order of inheritance in table of residuaries, the mother, maternal uncle or aunt and other maternal relation without prohibited degree and the state but in Shias, only father and paternal grandfather have this right but if the marriage of minor is contracted by any unauthorized person which is also known as Akd - fazuli is invalid. When the marriage is contracted by a nearer or remote guardian and such guardian does not give consent for the marriage it becomes void but if it is ratified by the parties after attaining majority it becomes valid.

**No legal disability:** Under muslim law, there are certain prohibitions of degree in which marriage is not permitted and they are as follows:

**1. Absolute incapacity or prohibition:**

This incapacity to marriage arises from consanguinity, affinity and fosterage. Consanguinity means the blood relation and a person's bar to marry in his blood relation and these relations include his mother or grandmother how highsoever, his daughter or grand- daughter how lowsoever, his sister whether full, consanguine or uterine, his niece or great-niece how lowsoever, his aunt or great aunt, howsoever, whether paternal or maternal. These are some prohibited degrees and a marriage with a woman prohibited by consanguinity is void and the issues arising from such marriages are illegitimate.

**Affinity:** a man is prohibited from marrying his wife's or grand-mother highsoever, his wife's daughter or grand-daughter how lowsoever, wife of his father or paternal grand-father how highsoever, wife of his son or son's son or daughter's son how lowsoever. A marriage within affinity is void but in the case of marriage with wife's daughter or grand-daughter is prohibited only if the marriage with wife was consummated.

Fosterage: a man can not marry his foster mother or her daughter but under sunni law, there are some exception on the fosterage and a person may marry with his sister's foster-mother, foster-sister's mother, foster-son's sister, foster-brother's sister. The Shias did not recognize these exceptions.

**2. Relative incapacity:** relative incapacity is only for those cases which are invalid or irregular as long as the cause which creates the bar exists. The moment when the bar ends, marriage becomes valid. For example, a man is prohibited from marrying more than four wives at a time and if he marries fifth time, this becomes invalid until he divorces one of them. There are some cases of relative incapacity.

**Unlawful conjunction:** a person can't marry two women which are so related to each other. The reason behind this is to avoid dual relationship. So a person can't validly marry his wife's sister till his wife is alive and this bar is removed when the person divorces his wife or wife is dead. The bar of unlawful conjunction renders a marriage irregular not void. In the case of Azizumissa vs karimunissa, it was held that the marriage with wife's sister is null and void if the wife is undivorced and alive but in sunni law, such marriage is irregular.

**Polygamy:** In muslim law, they are allowed to marry four women but if a person marries more than four women, the fifth marriage is considered as irregular under sunni law but void in shia law.

**Absence of proper witness:** In sunni, it is essential to have two male witnesses or one male witness and two female witnesses at the time of marriage and if the witness is absent, it would affect the contractual completeness and therefore, such marriage becomes irregular. In sunni law, the condition of testimony is not so essential that it can't be dispensed with and this was held in case of Bashir-un-nissa vs Buneyad Ali and also, it is necessary that witness must be sound adult muslim but in shia law, it is not necessary in the presence of witness and this was held in Nofun-missa vs Mumtaz Hussian.

**Difference of religion:** In sunni law, a male can marry with a muslim female of any

sect or a kitabia is valid but can't marry an idolatress it is mere irregular in sunni law but void in shia law. A muslim woman can't marry with a non-muslim man whether he is kitabia or not but under shia law, no muslim is allowed to marry a non- muslim whether male or female in the nikah form, it is totally void in shia law. However, shia is allowed to muta marriage with a kitabia. Muslim belonging to different sect can marry each other. Thus, marriage of a sunni male with shia female is valid and this was held in case of Aziz Banu vs Muhammad Ibrahim.

**Women undergoing Iddat:** Iddat is a period during which a woman is prohibited from marrying again after the dissolution of her first marriage. Under sunni law, marriage with a woman which is on Iddat is irregular but under shia law, a marriage with a woman which is on iddat is void. The concept of iddat is to ascertain the pregnancy of wife so as to avoid the confusion of parentage.

**3. Prohibitive incapacity:** these cases arise in polyandry and a muslim woman marrying a non-muslim. Polyandry means a woman has more than one husband and this is forbidden as per the muslim law. A muslim woman can't marry until the first marriage subsists and the woman who contravenes this rule shall be liable under section 494 of IPC and the issue of such marriage is illegitimate and this was held in case of Liaqat Ali vs Karimunnissa.

A marriage with a non-muslim male is irregular under sunni law and void under shia law.

**4. Directory incapacity:** this may arise from a woman enceinte, prohibition of divorce, marriage during piligrimage and marriage with a sickman. These are some essential conditions which should be followed by a muslim at the time of nikah for a valid marriage.

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